FILED
JAN 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-991

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

U.S. ROOFING CORPORATION,

Petitioner,

v.

OWENS-CORNING FIBERGLAS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

EARL E. POLLOCK *
ROBERT T. JOSEPH
BLAKE L. HARROP
SONNENSCHEIN CARLIN NATH
& ROSENTHAL
8000 Sears Tower
Chicago, Illinois 60606
(312) 876-8000

Attorneys for Respondent

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

16 pp

QUESTION PRESENTED

The Federal Trade Commission brought an action against respondent in a federal district court to enforce an administrative consent order which required respondent to divest certain roofing plants under specified conditions. Pursuant to an agreement negotiated between the FTC and respondent, the district court entered a final judgment. It set forth criteria and procedures for determining whether any proposed purchaser was qualified to buy respondent's roofing plants.

Applying the criteria and procedures of the final judgment, the district court held that petitioner did not qualify to purchase the plants. The FTC did not appeal. However, petitioner, which had been granted leave to intervene at the district court level during proceedings subsequent to the final judgment, did appeal. The Court of Appeals dismissed the appeal for lack of jurisdiction.

The question presented for review is:

Whether the Court of Appeals correctly held that it lacked jurisdiction over petitioner's appeal since, with the conclusion of the controversy in the district court between the FTC and respondent, there remained no justiciable controversy upon which the Court of Appeals' jurisdiction could be based.

RULE 28.1 LISTING

Pursuant to Rule 28.1 of the Court's rules, respondent Owens-Corning Fiberglas Corporation lists the following subsidiaries (other than wholly-owned subsidiaries) and affiliates: Arabian Fiberglass Insulation Company (Saudi Arabia); Amiantit Fiberglass Industries, Ltd. (Saudi Arabia); Asahi Fiber Glass Company, Ltd. (Japan); CAE Fiberglass Ltd. (Japan); Fiberglas Canada Inc.; Polyplaster, S.A. (Brazil); Vitro-Fibras, S.A. (Mexico).

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
RULE 28.1 LISTING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
REASONS WHY THE WRIT SHOULD BE DENIED	7
I. NO SUBSTANTIAL QUESTION WARRANTING REVIEW IS PRESENTED	7
II. THE DECISION BELOW IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER COURT OF APPEALS	10
CONCLUSION	11

TABLE OF AUTHORITIES

Cases	PAGE
Alfred Dunhill, Ltd. v. Interstate Cigar Co., 499 F.2d 232 (2d Cir. 1974)	9
Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975)	9
Buckeye Coal & Ry. Co. v. Hocking Valley Ry. Co., 269 U.S. 42 (1925)	9
Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17 (9th Cir. 1971)	10
Diamond v. Charles, 476 U.S. 54 (1986)	5, 8, 9, 10, 11
Dreisbach v. Murphy, 658 F.2d 720 (9th Cir. 1981)	9
Fulton v. Hecht, 580 F.2d 1243 (5th Cir. 1978), cert. denied, 440 U.S. 981 (1979)	9
United States v. American Society of Composers, Authors and Publishers, 341 F.2d 1003 (2d Cir.), cert. denied, 382 U.S. 877 (1965)	10

Treatise	
Wright, Miller & Kane, *Federal Practice and Procedure* (1986)	10

No. 88-991

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

U.S. ROOFING CORPORATION,

Petitioner,

v.

OWENS-CORNING FIBERGLAS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Petitioner seeks review of the Court of Appeals' dismissal of its appeal below for lack of appellate jurisdiction. None of the relevant considerations governing review on certiorari, as set forth in this Court's Rule 17, supports the grant of the requested writ. The decision of the Court of Appeals is wholly consistent—and is not in conflict—with the decisions of this Court and the other Courts of Appeals. Instead, all that is involved here is the application of well-established legal principles to the particular factual situation in this case.

STATEMENT OF THE CASE

Background

This matter grew out of a controversy between the Federal Trade Commission ("FTC") and respondent Owens-Corning Fiberglas Corporation.[1] In April 1977, respondent acquired certain assets of the Lloyd A. Fry Roofing Co. ("Fry"). On March 30, 1981, the FTC issued an administrative complaint charging respondent with violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 15 U.S.C. § 18, by its acquisition of Fry assets. On that same date, the

[1] Petitioner's original petition was returned to petitioner because it did not comply with this Court's format rules. Petitioner, however, was afforded an opportunity to file a substitute version in the proper format. Petitioner used this opportunity to both rephrase the questions presented and substantially rewrite its first argument, as well as make scattered additions throughout the brief. The apparent purpose of these additions was to increase the number of false and scurrilous charges about respondent. As these charges have no bearing on either set of questions that petitioner has presented to the Court, respondent will for the most part ignore them.

However, the innuendo in petitioner's assertion (Pet. 15) that respondent had hired the district judge's nephew as local counsel is simply too outrageous to be ignored. The facts are these: While the case was pending before Judge Sam Bell, Richard S. Walinski served as Owens-Corning's local counsel. However, as petitioner fails to disclose, when the case was reassigned to Judge Walinski, Mr. Walinski informed both the Court and the FTC that neither he nor his firm would continue to represent Owens-Corning. Shortly thereafter, new local counsel appeared on behalf of Owens-Corning. Neither the petitioner nor the FTC ever questioned Judge Walinski's impartiality in any of the proceedings below. Indeed, it was not until petitioner filed its revised petition before this Court that Mr. Walinski's earlier involvement in the case was even mentioned.

FTC, with respondent's consent, issued its order to divest ("Consent Order").

The Consent Order imposed upon respondent the obligation to sell certain asphalt roofing plants acquired from Fry to an "Eligible Person". The plants are located in Compton, California; Portland, Oregon; San Leandro, California; and Woods Cross, Utah.

The Proceedings Before The District Court

After attempting for two years to sell the plants, respondent unsuccessfully petitioned the FTC to vacate or modify the Consent Order. After denying that request, the FTC brought an action for civil penalties and other relief against respondent in the Northern District of Ohio pursuant to 15 U.S.C. § 45(*l*) of the FTC Act. Negotiations between the FTC staff and respondent resulted in an agreement embodied in the district court's July 30, 1984 Final Judgment ("Final Judgment").

The Final Judgment provided, *inter alia*, for the court's appointment of a trustee to divest the plants. The trustee was given nine months to find a purchaser; an extension of no more than 30 days could be granted to complete "ongoing negotiations". The trustee could submit offers to the FTC for approval. Specific criteria for approval of proposed acquirers were set forth.[2]

---

[2] A proposed acquirer was to be approved

> "only if divestiture to the proposed acquirer will further the remedial purposes of the Federal Trade Commission's Complaint and Final Order in Docket No. C-3061 . . . and the proposed acquirer has the capacity and intent to operate the plant or plants to be acquired as a facility or facilities for the manufacture of asphalt roofing products." (Pet. App. F11.)

The Final Judgment also provided that, while the FTC would initially determine whether a proposed acquirer met the qualifying criteria in the Final Judgment, Owens-Corning could petition the district court to make "an independent de novo determination" whether the proposed acquirer should be approved under the prescribed criteria.

At the end of the nine-month period for the trust, the trustee applied to the district court for a thirty-day extension to complete ongoing negotiations with petitioner with respect to the Compton and Portland plants. The district court granted the extension on June 14, 1985.

On June 28, 1985, the trustee entered into a purchase agreement with petitioner for the sale of all four plants. The purchase agreement was contingent upon approval of USR by the district court.

Respondent subsequently sought a declaration that, under the Final Judgment, its divestiture obligations with respect to the San Leandro and Woods Cross plants had expired when the trustee failed to request an extension of time to sell these two plants. The FTC did not oppose this position. USR filed a motion to intervene for the limited purpose of presenting its position on whether the extension of time applied to only two or four of the plants. The district court granted USR's motion for intervention, but ruled that respondent no longer was obligated to divest the San Leandro and Woods Cross plants.

Pursuant to the terms of the Final Judgment, respondent submitted materials to the FTC (including affidavits from experts) to demonstrate USR's inability to satisfy the criteria in the Final Judgment. After its consideration of the matter, the FTC sent a letter to the trustee stating that, by a 2-1 vote, the FTC would, under certain conditions, approve USR as a purchaser of the Compton and Portland plants.

Respondent subsequently filed its objections to the FTC's letter with the district court and petitioned it, pursuant to the Final Judgment, to make an independent *de novo* determination whether USR should be approved as a purchaser. Pursuant to Rule 24(b)(2), Fed.R.Civ.P., USR later filed an "Application For Permissive Intervention", which was granted by the district court.

On February 3, 1987, construing its own Final Judgment and pursuant to its terms, the district court made a *de novo* determination that USR did not meet the criteria prescribed by the Final Judgment and entered an order dismissing the action.[3] The decision is reported at 1987-1 Trade Cas. (CCH) ¶ 67,463. On April 6, 1987, USR filed a notice of appeal to the Court of Appeals from the district court's order dismissing the action. The FTC, however, did not appeal and was not a party to the proceedings in the Court of Appeals.[4]

---

[3] The district court found that (1) USR does not have the capacity to operate the facilities to manufacture asphalt roofing products; (2) the proposed divestiture to USR would not further the remedial purposes of the FTC's Consent Order; (3) USR does not have the required intent to operate the plants to manufacture asphalt roofing products; and (4) the so-called "purchase agreement" between the trustee and USR was illusory and lacked mutuality and imposed unauthorized conditions. (Pet. App. C.)

[4] Petitioner's list of "parties to the proceedings below" (Pet. (ii)) is therefore inaccurate. Although the FTC sent a letter to the Sixth Circuit (Pet. App. B), this was "insufficient to bring the [FTC] into the suit as an appellant." *Diamond v. Charles*, 476 U.S. 54, 63 (1986). Moreover, contrary to petitioner's new assertion (Pet. 17), the FTC was not "[s]upporting U.S. Roofing's appeal." While the FTC did state that it believed it had been right in its position before the district court, it conceded that it had decided not to appeal because it could not demonstrate the reversible error that would justify appellate review. (Pet. App. B2-B3.) Moreover, the FTC noted that "the arguments by U.S.R. in support of its position are not necessarily those of the Commission." (Pet. App. B3.)

The Court of Appeals' Decision

After the notice of appeal had been filed by USR, OCF filed a motion to dismiss the appeal for lack of jurisdiction. On August 4, 1988, after briefing on the jurisdictional issues and merits had been concluded and after oral argument, the Court of Appeals dismissed USR's appeal for lack of appellate jurisdiction.[5]

The Court stated that "[w]hen the FTC failed to appeal the district court's reversal of its findings of fact . . ., that was the end of the matter", and that "[b]y electing not to appeal, the FTC has accepted the district court's decision as the final resolution of the matter in enforcement of the FTC order and the FTC complaint for civil remedy." (Pet. App. A11.) USR could not assume the FTC's role for its private gain since it was "neither a party to the Final Judgment, nor to any consent agreement or order." (*Ibid.*)[6]

The Court further held that the government is the sole proper party to seek enforcement of government antitrust decrees, and that USR may not, as a private party, invoke the jurisdiction of the federal courts to enforce the FTC Act. (Pet. App. A10-A12.) "In this context", the

---

[5] The Court also held that the district court's *de novo* factual review was "permissible for the purpose of enforcing, pursuant to 15 U.S.C. § 45(*l*), its final judgment based on a consent order to which the FTC is itself a party, and where the FTC had expressly agreed to be bound by such *de novo* review." (Pet. App. A8.) That holding is not challenged by petitioner.

[6] Contrary to USR's attempt to distort the Sixth Circuit's decision, that court never held that USR was not a party to the proceedings in the district court. Rather, the Sixth Circuit held—as is indisputably true—that USR was not a party to the FTC consent decree or the July 30, 1984 "Final Judgment", the title of the district court's consent order. (*Ibid.*)

Court stated, "enforcing the terms of a final judgment was a matter in which a private individual such as USR had no independent rights." (Pet. App. A10.)[7]

REASONS WHY THE WRIT SHOULD BE DENIED

I.

NO SUBSTANTIAL QUESTION WARRANTING REVIEW IS PRESENTED

The Court of Appeals dismissed petitioner's appeal for lack of jurisdiction. Petitioner does not dispute either of the dispositive underpinnings of the Court's decision: (i) the FTC elected not to appeal and its controversy with respondent was therefore concluded; and (ii) an FTC consent order is not enforceable directly or in collateral proceedings by those (such as petitioner) who are not parties to it.

Although not challenging these underpinnings of the decision below, petitioner argues that its intervenor status in the district court necessarily entitled it to proceed with its appeal. Petitioner, however, misses the point. Irrespective of what appeal rights an intervenor might otherwise have, no appeal can be pursued by any litigant in the absence of jurisdiction. Contrary to the premise of petitioner's argument, the fact that the district court allowed

[7] Petitioner makes the totally puzzling statement that a "preliminary injunction" (presumably of the district court or Court of Appeals) conflicts with decisions of this Court. (Pet. 28.) No preliminary injunction was ever entered by either court below.

petitioner to intervene cannot itself confer jurisdiction on the Court of Appeals.

The decision below is clearly correct and precisely in accord with the decisions of the Court. As this Court recently held in *Diamond v. Charles*, 476 U.S. 54, 68 (1986), ". . . an intervenor's right to continue in a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." Accordingly this Court dismissed Diamond's appeal for lack of jurisdiction "[b]ecause he lacks any judicially cognizable interest" (476 U.S. at 71), holding that "To continue this suit in the absence of Illinois, Diamond himself must satisfy the requirements of Art. III" and that "The interests Diamond asserted before the District Court in seeking to intervene plainly are insufficient to confer standing on him to continue this suit now." (*Id.* at 69.)

The *Diamond* case is "on all fours". This Court there ruled that, "By not appealing the judgment below, the State indicated its acceptance of that decision and its lack of interest in defending its own statute . . . [I]ts failure to invoke our jurisdiction leaves the Court without a 'case' or 'controversy' between the appellees and the State of Illinois." (*Id.* at 63-64.) The Court further held that the intervenor's ". . . ability to ride 'piggyback' on the State's undoubted standing exists only if the State is in fact an appellant before the Court; in the absence of the State in that capacity, there is no case for Diamond to join." (*Id.* at 64.)

Likewise, in the instant case, by not appealing the district court's judgment, the FTC "indicated its acceptance of that decision and its lack of interest in defending its own" determination, and its failure to appeal left the court

below without a "case or controversy" to adjudicate. By the same token, petitioner's "ability to ride 'piggyback' on the [FTC's] undoubted standing exists only if the [FTC] is in fact an appellant before the Court; in the absence of the [FTC] in that capacity, there is no case for [petitioner] to join."[8]

As in *Diamond*, the FTC's election not to appeal effectively ended the "case or controversy". Petitioner admits this action arose out of an action brought by the FTC pursuant to Section 15(*l*) of the FTC Act, 15 U.S.C. § 45(*l*), to enforce its own consent decree. (Pet. 9.) Since only the FTC is authorized to enforce its consent decrees, the Sixth Circuit correctly held that petitioner could not invoke the jurisdiction of the courts for such a claim.[9] Accord, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975) ("a well-settled line of authority from this Court establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it"); *Buckeye Coal & Ry. Co. v. Hocking Valley Ry. Co.*, 269 U.S. 42, 49 (1925) ("The United States which alone speaks for the public interest does not appear with

---

[8] It is noteworthy that the *Diamond* Court unanimously concluded there was no jurisdiction (four Justices concurring) even though the State was a party in this Court, albeit as an appellee rather than appellant. Here, by contrast, the FTC is not a party at all, and the *Diamond* rationale therefore applies *a fortiori*.

[9] Nor did petitioner have any other cause of action under Section 15(*l*), since only the FTC may enforce the FTC Act. See *Dreisbach v. Murphy*, 658 F.2d 720, 730 (9th Cir.); *Fulton v. Hecht*, 580 F.2d 1243, 1248 n.2 (5th Cir. 1978), cert. denied, 440 U.S. 981 (1979); *Alfred Dunhill, Ltd. v. Interstate Cigar Co.*, 499 F.2d 232, 237 (2d Cir. 1974). Indeed, petitioner has never filed an intervenor complaint setting forth any justiciable case or controversy upon which it could assert the jurisdiction of the courts.

them on this appeal. They therefore have no locus standi."). See also *Dahl, Inc. v. Roy Cooper Co.*, 448 F.2d 17, 20 (9th Cir. 1971) ("[o]nly the Government can seek enforcement of its consent decrees"); *United States v. American Society of Composers, Authors and Publishers*, 341 F.2d 1003, 1008 (2d Cir.), cert. denied, 382 U.S. 877 (1965) ("the government is the sole proper party to seek enforcement of government antitrust decrees").

Petitioner not only fails to make the Art. III showing required by *Diamond* but, indeed, completely ignores the jurisdictional issue. Instead, petitioner complains of a "reversal of the basic entitlement granted to qualified Intervenors in recent times." (Pet. 24.) However, no litigant—whether plaintiff, defendant or intervenor—has any right of appeal in the absence of underlying jurisdiction. The Court of Appeals simply held, applying well-established elementary principles, that it had no jurisdiction over petitioner's appeal in the circumstances of this case. While there may be situations where an intervenor may properly appeal from a lower court decision even though an original party on whose side it intervened has elected not to do so, this case is plainly not one of them.

II.

THE DECISION BELOW IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY OTHER COURT OF APPEALS

As already pointed out, the decision below is precisely in accord with the decisions of this Court.

Nor is there any conflict with a decision of any other Court of Appeals. Petitioner quotes two excerpts from Wright, Miller & Kane, *Federal Practice and Procedure* (1986), concerning the "principal [*sic*] of subordination" (Pet.

28) and an intervenor's general appeal rights (Pet. 28-29). However, the decision below has nothing to do with "subordination"; both excerpts pre-date *Diamond* and neither addresses the jurisdictional issue; and in each of the cited decisions (Pet. 29), the requisite "case or controversy" continued to exist at the time of the appeal. Those cases are irrelevant to the question presented here and in *Diamond*—whether intervenor status in the lower court confers appellate jurisdiction when there is no longer any justiciable "case or controversy".

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

EARL E. POLLOCK *
ROBERT T. JOSEPH
BLAKE L. HARROP
SONNENSCHEIN CARLIN NATH
& ROSENTHAL
8000 Sears Tower
Chicago, Illinois 60606
(312) 876-8000

Attorneys for Respondent

* Counsel of Record

Dated: January 11, 1989